IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 108 OF 2004.

Appadorai Subbaiya Devendra
Convict NO.C/2163,
Kolhapur Central Prison,
Residence of Room No. 23,
Kanjpada Pipe Line, Sakinaka
Post. Kurla, Mumbai-72. ..Appellant

V/s

The State of Maharashtra .. Respondent.

Shri Ram Makhija, Appointed Advocate for the appellant.

Mrs. M.M. Deshmukh, A.P.P. for the State.

CORAM : S.C. DHARMADHIKARI, J.

DATE : 19TH & 25TH SEPTEMBER, 2006.

P.C.

. This Appeal is through jail. The convict is lodged at Kolhapur Central Prison. He was arrested on 13th of March 2001.

2. The appeal challenges the Judgment and Order delivered by the Additional Sessions Judge, Court of Sessions for Greater Mumbai, in Sessions Case No. 596/2001. By the Judgment and Order under challenge the Appellant-accused is held guilty of offences punishable under Sections 307 and 343 of Indian Penal Code. He was

convicted and sentenced to suffer Rigorous Imprisonment for 7 years under Section 307 of Indian Penal Code and for a period of one year under Section 343 of Indian Penal Code. He was ordered to pay fine of Rs. 5000/- each on the above counts and in default to suffer R.I. for 3 months and one month respectively. The substantive sentences were to run concurrently.

3. The prosecution case, in brief, is as under:

. The appellant accused and the injured viz.Arvind Mahadeo Chandanshive were known to each other. The injured was residing in Gautam Nagar hutment Gavdevi Road, Bhandup (West) Mumbai. He was in the business of Video Games at Saki Naka Mumbai. The business was being conducted in the rental premises owned by one Mr. Nijam. The injured was known to the appellant and he was also in Video Game business.

4. On 11th March, 2001 at about 19.15 hours the injured was sitting in the shop of Mr. Nijam at Kaju Pada, Saki Naka. At that time the appellant came there and told the injured, that he will hand over the Gala key to him. Thereafter, the appellant took injured to

his room on the second floor in Kaju Pada, Saki Naka. The appellant told the injured to sit there. Thereafter the appellant closed both doors of the room and locked the same from inside. The appellant and injured only were in the house. The appellant insisted that the injured should carry on business with him in partnership. The injured refused. Appellant then assaulted the injured with sword and he sustained injuries on his throat, right ear, both hands and on the head. He also sustained injuries on his left leg. The injured started screaming but the appellant after assaulting him opened the door and fled. The injured therefore, come down and rushed to the hospital (Fauziya Hospital) at Kurla in an autorickshaw. The first information report was lodged on 12th March, 2001, alleging commission of offences under sections 307, 343 of Indian Penal Code.

5. Upon arrest of the appellant, the investigations were completed and the charge-sheet was filed.The Sessions Court thereafter, framed charges and the trial commenced as the appellant pleaded not guilty to the charge and prayed that he be tried.

6. The charge was that the appellant on 11th March, 2001 at about 19.35 hours in the room of one Sundaram at D'souza Estate, Kajupada assaulted the injured by means of sword as narrated above and therefore, committed offence punishable under section 307 of Indian Penal Code. The second limb of the charge is that during the aforesaid act of the appellant accused he wrongfully confined the injured and thereby committed an offence punishable under section 343 of Indian Penal Code. The charge was read over on 1st August 2002 and the appellant pleaded not guilty as above.

7. The prosecution examined about 8 witnesses including injured.

8. P.W. 1 is one Nandu Popat Dhavare. He has stated in his deposition that in February, 2001, he was residing at D'Souza Estate, Kajupada, Sakinaka. On 11/2/2001 he was at home as it was Sunday. At about 19.30 to 20.00 Hrs. he heard shouts from the house of one Sundaram. Hearing such shouts he came out of his house. His house is adjacent to the house of appellant and he know the appellant. At the time of the incident he saw the appellant going out of his house. P.W. 1's

statement recorded by police on 12th March, 2001 with the portion marked "A" and"B" were shown to him during the course of his cross-examination and he has stated that the contents are true and correct. He has so stated before the police. The cross-examination was conducted none other than the Assistant Public Prosecutor because this witness was declared hostile.

9. In the cross-examination which was conducted by A.P.P. all through out this witness refers to the date of the incident as 11th February, 2001.

10. I will refer to his deposition in some details at a later stage, if necessary.

11. P.W. 2, is the injured. He has deposed that the incident occurred on 11th March, 2001 and the room of the appellant was on second floor in Kajupada, Saki Naka. The injured further refers to the complaint recorded by police when he was undergoing treatment at Fauziya Hospital. The complaint is recorded on 12th March, 2001. Thereafter P.W. 1 states that he will be able to identify the weapon by which he was assaulted and clothes which were on his person at the relevant

time.

12. In the cross-examination by the Appellant's Advocate, the injured states that he was in Video Game business for about 2 years prior to the incident. Initially, he was doing that business at Bhandup. He did not have any licence. The business was being conducted in partnership with others. He does not know any details with regard to the partnership being registered and who were the partners. Later on, he has stated that he used to give Video Game Machines on rental basis. He states that he does not know Kailash Shopping Centre, Sakinaka, as he was not doing business from the said premises. A suggestion was given regarding whether he was working with Chandu Shetty. The injured volunteers and states that he was working with Ravi Shetty long back. P.W. 2 states that it is true that in the month of February, 2001 he and the appellant had been to one Nijam for securing premises on rental basis and deposit of Rs. 20,000/- was fixed for the premises. He does not remember the date of such meeting. He admits that before the incident he removed the video Game Machines from the premises at Saki Naka. The injured stated that along with appellant he was

doing the business at Saki Naka. They were doing the business together for about 2 months and two boys were engaged as employees. He has stated that he and the accused were present when the machines were removed. He had with him one boy for removing machines. A suggestion was made that he brought one Gunda with him to assault the two boys employed by the appellant. He denied the same. He has stated in his deposition that he was assaulted on the second floor and he is not aware of the fact as to whether the ground floor premises was occupied by anybody. He did not know as to who is the owner of the house. The appellant according to this injured witness took him to the appellant's house at Jarimari area. A suggestion was put as to whether he had said that he knew the place where the accused was residing and whether he has stated before the police that the said premises belongs to one Sterling. He states that he does not recollect the same.

13. When asked as to why in the statement to the police it is not recorded that the appellant locked both doors from inside. The injured stated that he cannot assign any reason why it is not so recorded. He states that he could get a rickshaw at a distance of 5 minutes

walk from the place of incident. He further states that he did not know any hospital but it was the autorickshaw driver who took him to that hospital. The area between the place of incident and Auto Rickshaw stand is through hutment locality. It took him about 20 minutes to reach hospital. Auto rickshaw driver took him inside the hospital and he was admitted in the hospital. He states that the police arrived after 2/3 hours and he does not recollect the time when he was taken in the operation theatre. He states that he received injury to his right hand as he tried to save himself from the assault. He admits that when he sustained injuries to his head he felt little giddy. He fell on the floor. The accused fled from the scene after he fell on the floor. Immediately after accused fled he came down. The injured states that he drank water and then came down. According to him it takes 8 to 10 minutes walk to reach the place of incident from Nijam's Shop. Incident took place between 19.30 to 19.45 hours and he was in the house of the accused/place of the incident for about 5 to 6 minutes in all.

14. A suggestion was put by the accused that there was a dispute between the appellant and him regarding

partnership and that he has falsely implicated the appellant. He denied the said suggestion. He was put a suggestion that he was assaulted by some other person. He denies the said suggestion and also that he was falsely involving the appellant.

15. P.W. 4 is a Cobbler. He has been examined because he went to the police Station for identifying the voluntary statement given by the appellant after which he showed the place where he had hidden the sword which was used to assault the injured.

16. It is apparent from the testimony of P.W. 4 that he is a Cobbler and has no fixed place of business. He has admitted that on the relevant date i.e. 14th March, 2001, he was polishing shoes in his building next to the police station and he was called by the police. He never acted as a panch witness and he admits that he was called for acting as a panch witness at the police station. The rest of the deposition and his cross-examination contains the details with regard to the disclosure by the appellant of the weapon.

17. P.W. 5 is also another panch witness.

18. P.W. 6 is Dr. Anand Rameshchandra Jajare. He is a Orthopaedic Surgeon and residing at Shivaji Park, Mumbai.

19. He is an M.S.Orthopaedic and was attached to Fauzia Maternity Nursing Home. In his deposition which was recorded on 10th January, 2002, he has stated that the injured was initially seen by the Resident Medical Officer. He was brought to the hospital at about 9.55 P.M. In his examination-in-chief P.W. 6 States thus:

> "I have personally attended the injured.The injured had multiple injuries as below.
>
> 1. CLW from the base of the index finger to the wrist joint cutting through the thenar muscle and flexer pollicis longus tender on the right hand.
>
> 2. CLW on the right middle finger on the flexer aspect with both flexour tenders cut and PIP joint exposed.
>
> 3. Right ring finger was amputed through the middle phalanx.
>
> 4. CLW on the right pariatal region 5 cm. long bone deep.
>
> 5. Tangentied injury right temporal region causing degloving of skin and amputation of upper half of the pinna of the right ear.

6. CLW right side of the neck 3 cm. long subcutaneous.

7. CLW supersteneral area 2 cm. long subcutaneous deep.

8. CLW lateral part of the left wrist 3 cm. long, bone deep with flexor carpi radialis cut.

9. Small superficial CLW left thigh 3 cm. long."

"All the injuries were first cleaned and then sutured. The injured was admitted in the hospital and was indoor patient. All these injuries could be caused by sharp weapon like sword, chopper, knife etc. The injury at Sr. No.6 and Sr. No.7 could have resulted in death provided they deep enough. The patient was required to take treatment for minimum period of about 6 to 8 weeks. On discharged the patient was advised antiboytiques and further follow up treatment. I am producing on record the original certificate dated 25.12.2002. It is in my handwriting and bears my signature. The contents are true and correct. I have taken the information from the hospital record. the certificate is given Exh.20."

20. The original injury certificate is not signed by P.W. 6 but Dr. Parvez. This fact is admitted by him. He states that he also attended the injured. He purported to depose about the contents of the certificate Exh.21 which is probably signed by Dr. Parvez. The appellant’s advocate raised an objection but same was overruled by the learned Judge by observing that the Doctor concerned P.W. 6 personally attended

the injured and he is aware of the injuries.

21. In the cross-examination of P.W. 6, his attention was invited to the injury certificate and specifically injury Nos. 6 and 7. He admitted that they are superficial injuries and they could not have resulted in death. They are simple injuries. However. according to him they are on the sensitive portion of the body. He admits that the injuries at serial No. 1 to 5 cannot be caused by blunt object. A question as to how a injury caused by the sharp object is written as CLW, P.W. 6 states that many Doctors including he writes the same as CLW.

22. He has admitted that the hospital maintains the record of the patients and doctor do not do so. He admits that when the injured was brought to the hospital, he was indoor patient and was attended by the emergency doctor. Dr. Parvez was the Doctor in-charge of the emergency on that day. He admits that he attended the patient at about 10.30 or 10.45 in the night. He admitted in his cross-examination that before the injured was seen by him, treatment was administered by emergency doctor. The injured was given I.V.fluids,

pain killer injunction, antibiotics and emergency dressing of the wounds. He admitted that Dr. Parvez is still attached to Fauzia Hospital. He took the patient to the operation theatre and attended the patient and he was attending the patient till discharge from the hospital. He further admits that Exh.21 does not show the name of Dr. Pervez but it is signed by him. To a specific question as to how many days the injured was in the hospital as indoor patient.P.W. 6 says he does not recollect.

23. P.W. 7 is I.O.

24. In his cross-examination he states that he received information from the Bhagtwati hospital. He admits that he has not recorded any statement. A specific question was put to him about sealing and he states that he has no explanation as to why there is no reference to sealing in the panchanama. He denies that no statement was made by the appellant leading to recovery of Article No.1 at his instance.

25. P.W. 8 is P.S.I. Pachpute of Saki Naka Police Station. In his cross-examination at page 72 of the

paper book he states thus:-

> "We came to know the name of the assailant as Appa only. It will not be correct to say that his address was not intimated to us. The same is referred in the FIR. It is true that exact postal address was not given to us. The premises was ground plus one. There is no second floor on it. I have not recorded the statement of people residing on the ground floor. It is not true that the accused locked both the doors from inside. I have not recorded the statement of rickshaw driver."

26. He further stated that he has not recorded the statement of mother, brother, sister of P.W. 1 . With regard to Exh.7A and 7B, he denies the suggestion that they were not by that person. He was put the suggestion that the clothes were not on the person of the injured and he denies that suggestion. However, he admits that panchas at Exh.15 was called by constable. He admits that there is no reference to sealing in Exh.13 and Exh.15. He also admits that there is no reference to sealing of articles at the time of spot panchanma. To a specific suggestion he is admitting that he has not obtained the signature of accused at Exh.13A. He denies that accused did not take the police and panchas to the place. It is further denied by him that no statement

was made by the accused leading to recovery of article No.1.

27. The appellant did not examine anybody. In his statement recorded under section 313 when asked about whether he was residing in the same locality and whether he was sitting in the house of one Sundaram, the appellant has stated that he was staying in the house of one Sundaram but he did not know P.W.1. He does not know what is the business of P.W. 2 was but admitted that the was his friend.

28. Thereafter, the learned Judge heard the parties and framed points for determination. The first point framed was whether the prosecution establishes that the offence was committed by the accused and finding is in affirmative. As to what offence, if any was committed, the finding is, as per final order.

29. I have heard Shri Makhija who has been appointed as advocate for the appellant-accused and Mrs. Deshmukh, learned.A.P.P. for the State.

30. Mr. Makhija has contended that there are no eye

witnesses in the case. The appellant, according to him, cannot be held guilty of commission of an offence under Section 307 of Indian Penal Code. Mr. Makhija has invited my attention to section 307 of Indian Penal Code and contended that there are no serious injuries. He has invited my attention to the deposition of P.W. 2 i.e. injured and P.W. 6 i.e. Doctor. He submits that it is pertinent to note that injuries are superficial injuries. He invited my attention to the deposition of Doctor and has contended that even the Doctor has admitted that injuries Nos. 6 and 7 would not have resulted in death but are superficial or simple in nature and not on vital part of the body. In such a case, there is no question of the ingredients of section 307 of Indian Penal Code being satisfied.

31. He submits that it is pertinent to note that at the time of alleged incident only the appellant and injured were present. From the deposition of the injured it is clear that there is no question of appellant having any intention to kill. There is no question of appellant therefore, being held guilty of offence punishable under section 307 of Indian Penal Code. He submits that there is absolutely no evidence

much less probable or convincing one and the conviction and sentence imposed by the learned Sessions Judge is vitiated.

32. Shri Makhija submits that the impugned judgment and order is wholly erroneous, illegal and improper. The said Judgment ignores the testimony of material witnesses. Further, material omissions have also not been noted in it. Mr. Makhija criticised the manner in which learned Sessions Judge has rendered his Judgment of conviction and sentence. According to Shri Makhija, despite noting the substance of deposition of the witnesses in this case, the learned Judge has conveniently omitted to make any reference to the improvements and admissions therein. He submits that even the Medical evidence is untrustworthy and unreliable. In these circumstances, the only conclusion that is possible is that the appellant is falsely involved in this case. Once the prosecution has to prove the guilt beyond reasonable doubt then the materials produced in this case, if tested on this touch stone, do not make out any case for conviction of the Appellant of a serious offence punishable under section 307 of Indian Penal Code. The entire Judgment is

therefore, erroneous and is liable to quashed and set aside.

33. On the other hand, the learned A.P.P. has invited my attention to the deposition of the injured as also Doctor. She submits that the alleged omissions are not such as would in any manner destroy the testimony of these witnesses. Their reliability and truthfulness is not shaken during the course of their cross-examination. Further, there is a recovery of weapon used during the commission of the offence. The accused voluntarily surrendered himself. In these circumstances, the evidence of the injured is to be believed. No corroboration is necessary. This is a clear case where on account of business rivalry in video games machines business, that the incident has taken place. It is clearly proved that the injured was called by the appellant, firstly, at the shop and thereafter at his place of residence where he was forced to agree to do business with the appellant. Upon refusal of the injured to-do so, the appellant was agitated and assault took place. She submits that therefore, no corroboration is necessary once these basic aspects are proved. She says that there was an intention to kill

the injured. The offence is thus proved. The injuries are serious in nature and caused by blunt edged weapon. The learned Judge was right in his conclusion and the Judgment of Conviction and sentence does not require any interference by this Court in exercise of its Appellate powers. She states that once no act is attributed to the injured then this is not a case of a incident occurring at the spur of a moment. There is definite intention of causing such injuries as would cause death of the injured. For all these reasons, she submits that the appeal be dismissed.

34. In view of the rival contentions, the only point that arises for my determination is whether the Judgment of conviction rendered by the Court below requires interference in exercise of my Appellate powers or not?

35. Before recording my findings and conclusion, it would be necessary to reproduce Section 307 and 343 of Indian Penal Code with which the appellant is charged in this case. Section 307 deals with attempt to murder which reads thus:-

> "Whoever does any act with such intention of knowledge, and under such circumstances that, if he by that act caused death, he would be guilty

> of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

Section 343 of Indian Penal Code;

> "Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

36. A bare reading of the first part of the section would show that for anybody to be held guilty of the offence set out therein, it must be established and proved that the act was committed with such intention or such knowledge and under such circumstances, that if death occurs by the act, the person charged would be guilty of murder, and he is liable to be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine and if hurt is caused to any such person by such act, the offender shall be liable to either imprisonment for life, or to such punishments as mentioned above. Both sides have not addressed me on the Applicability of Section 343 because there is no evidence to support the charge and conviction. That is the agreed position.

37. In AIR 1988 SC 2127 (Hari Kishan and State of Harayana V. Sukhbir Singh and others) the Hon'ble Supreme Court has observed thus :-

> "Under S. 307, IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary (to) constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under S. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensure. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention."

38. In the present case, it is pertinent to note that P.W. 1 a neighbour, residing at Kajupada has been declared hostile. Despite this learned Judge permitted cross-examination of this witness by the Advocate for the accused.That apart, in the deposition of the injured he has stated that he was residing in March, 2001 at Gautam Nagar hutment, Gaondevi Road, Bhandup (West). He was doing business in Video Games at Sakinaka Bombay.

The business was being conducted in rental premises. The landlord is one Mr. Nijam. The appellant is also in video game business.The injured then narrates the incident. However, it is pertinent to note that it is the injured's version that after the assault the room door was opened and the appellant fled. The injured came down and rushed to the hospital in Kurla in an autorickshaw, where he was admitted. He was indoor patient there for 5- 6 days. Thereafter, he left the hospital on his own and went to his native place.

39. In his cross-examination he states that he has been in video Game business about 2 years prior to the incident and the business initially has been conducted at Bhandup, Mumbai. There was no licence. He was allegedly doing business in partnership with others. Upon being questioned, he does not know any details about this partnership. Thereafter he states that he used to give video game machines on rental basis. The witness is asked about his business connections and the place where the business was being conducted. However, he denies that he did business with the persons whose names are appearing in para 11 of the deposition.

40. The version of the injured about his meeting with the appellant/accused thereafter suffers from material discrepancies. In his deposition at para 3 (i.e. examination-in-chief), he states that he was doing business in rental premises owned by one Nijam and he was in the shop of Mr. Nijam at Kajupada, Sakinaka when the appellant came there. However, in his cross-examination he states that in the month of February, 2001 he and the accused had been to Mr. Nijam for securing the premises on rental basis. He does not recollect the exact date. However, he states that the deposit amount of Rs. 20,000/- was fixed. It is pertinent to note that while striking a deal for taking the premises at alleged sum of Rs. 20,000/- and 8 days prior to the incident, injured was removing video game machines from the premises at Sakinaka. Thereafter, the injured states that he and the appellant were doing business at Sakinaka for about 2 months and they had engaged two boys as employees.The appellant-accused and the injured were present at the site of removal of the machines. There were two boys who were present.

41. With regard to the incident, the injured in his cross-examination admits that he does not know who is

the owner of the house where the appellant allegedly took him. He states that the accused took him to his house in Jarimari area. In the examination-in-chief he states that the accused took him to his room on the second floor in Kajupada, Sakinaka. When his attention was invited to his statement to the police that he had given details about the ownership of the house, the injured says that he does not recollect.

42. One more material omission comes thereafter. The injured states in his cross-examination that he had stated before the police that the appellant locked both doors from inside but the same is not recorded in his statement. He cannot assign any reason as to why such statement was not recorded by the police. He admits that he could get autorickshaw at a distance of 5 minutes walk. Thereafter, he states that he does not know Fauziya Hospital but the autorickshawala took him to that hospital. The journey from autorickshaw stand to the hospital took about 20 minutes and it is the autorickshawala who took him inside the hospital and admitted him. In his cross-examination he says that "I received first injury to my right hand as I tried to save myself from the assault". However, in his

examination in chief he states that he sustained injuries to throat, right ear, both hands and on the head, so also left leg. He states that the entire incident took time of 5 to 6 minutes. In para 17 this what he has stated as under:-

> "It is not true to say that there was dispute between me and the accused regarding the partnership and for that reason I falsely implicated the accused. It is not true to say that I deposed falsely that accused assaulted me on my refusal to do business with him in partnership. it is not true to say that I was assaulted by some other person and I falsely involved the accused. It is not true to say that I identified the weapon, sword on the say of police. It is not true to say that I am deposing false."

43. There is a major discrepancy in the deposition of witnesses about the premises where the incident took place. There is no consistency in the description thereof. P.W. 2 and the I.O.'s version are totally contradictory. The injured states that the incident took place on second floor, whereas I.O. states that there is no second floor in the Building. Therefore, the improvement in the statement before Court from those recorded by police assume significance.

44. In the light of this, I find much substance in

the contention of Shri Makhija that the version of the injured is not truthful. There are material discrepancies. It is unbelievable that a person allegedly sustaining serious injuries by a weapon like sword had the strength to get up and walk down the staircase and take a autorickshaw and sit in it for about 20 minutes to reach the hospital. Thus, material omissions in the version of the injured before the police and before the Court lends support to Mr. Makhija's pleas that the appellant accused might have been falsely implicated by the injured in the incident on account of a business rivalry. In any case such a possibility cannot be ruled out.

45. For the purposes of appreciating the other submissions of Shri Makhija, it would be appropriate to note that there are no eye witnesses. There is nothing on record to indicate that in the short duration that the appellant and the injured were allegedly carrying on business, they developed enimity to such an extent that he had a motive to take revenge by inflicting serious injuries upon him by a sharp edged weapon. It is in this context, that the suggestions to the injured and his replies thereto become relevant. It is pertinent to

note that the injured admits that the machines were removed with the assistance of some persons. A heated exchange and scuffle on such an occasion may not be ruled out. Therefore, Injured and Appellant could not continue their activities further.

46. The Doctor examined by the prosecution is an Orthopaedic Surgeon. Fauziya Maternity Nursing Home to which Doctor is attached since its inception, is situate at Kurla. The injured according to doctor was initially seen by RMO. He was brought there at about 9.55 p.m. Here, it is pertinent to note that the date and time of the incident is between 19.30 to 19.45 hours. The incident was over within 5 to 6 minutes. Thereafter, the injured drank a glass of water and came down, got into auto-rickshaw and reached the hospital in 20 minutes. However, Doctor states that the injured was brought at about 9.55 p.m. He states that he has personally attended the injured and he had injuries as described in para 2 of his deposition.

47. The Doctor states that the injuries were first cleaned and then sutured. The injured was an indoor patient. The Doctor says that the injuries could have been caused by sharp weapon like sword, chopper, knife

etc. Thereafter, he deposed that the injuries at serial No. 6 and 7 could have resulted in death, provided they are deep enough.

48. I have already referred to his deposition in great details. As to why the Doctor who has attended the injured had not signed the injury certificate, which is produced in original, is also not explained. When a specific question was put to P. W. 6 in his examination-in-chief he states that the injury certificate is signed by Dr. Parvez. Thereafter, he states that he has attended the injured.

49. In the cross-examination, when Doctor's attention was drawn to the injuries sustained by the injured at item No. 6 and 7, he admits that they are superficial injuries. Even injuries which were serious (Sr.No. 6 and 7) have been stated by him as not enough to result in death. They are simple injuries but on sensitive area of his person. The cross-examination if read in its entirety, completely destroys the version of the Doctor as also of the prosecution. If the incident were to really take place and the injuries were so serious, then the prosecution would definitely have

examined the Doctor who had first seen and attended the injured. In this case, Dr. Parvez is admittedly that person. That Dr. Parvez has not been examined despite his availability goes to show and makes it clear that he would not have supported the prosecution theory. It is pertinent to note that if the patient was admitted as an emergency case and treatment was already administered to him before P.W. 6 arrives then, the concerned Doctor should have been examined, who in this case was the R.M.O. That whether his name is Dr. Parvez or not is also not clear. Both R.M.O./Dr. Parvez are not examined. Be that as it may, the Doctor who has been examined admits that the injuries are simple and superficial.

50. It is in these circumstances that I find substance in the contention of Shri Makhija that the evidence led in this case is not at all convincing. If the prosecution wants to bring home the charge under Section 307, then, as rightly pointed out by Shri Makhija all ingredients had to be proved. There is no material to demonstrate that the appellant before me inflicted the injuries with the weapon as the recovery also is doubtful when there is no clarity about the

date, time and place of incident then the charge cannot be held to be proved. Even assuming that the incident took place and a sharp edged weapon was used in the assault and the same recovered, yet, the nature of the injuries being such it would not be proper to hold that the ingredients of Section 307, which deals with attempt to murder, are satisfied in this case.

51. Before concluding, I want to express my dissatisfaction about the manner in which the learned Additional Sessions Judge has dealt with this case. The learned Additional Sessions Judge was aware of the fact that he was dealing with a criminal case. He was definitely aware of the nature of proof that is required to prove that an accused is guilty of an offence under Indian Penal Code. The charge has to be proved beyond reasonable doubt. It is a matter where the accused is charged with attempt to commit the murder. The duty of the prosecution is to prove its case beyond reasonable doubt and the burden lies on the prosecution, yet, the learned Additional Sessions Judge has dealt with the matter in a casual manner. He has referred to each and every witness but has omitted to take into consideration the admissions in the cross-examination and the material

omissions in their version. It is not as if, they were not highlighted before him. It appears from a reading of his Judgment that they were indeed highlighted.

52. The learned Judge has observed that the identity of the accused before the Court is established beyond doubt. In his words, there is no identity crisis.

53. After referring to the deposition of P.W. 2 and his cross-examination which is fairly elaborate, the learned Judge, observes thus:-

> "It is also brought on record in the cross-examination by Mr. Desai that both of them were carrying on videogame business for about two months at Saki Naka and therefore, the aspect of identity either by one or the other is totally ruled out. The aspect of attack by a person known is clear from the record. Whatever be the reason for it, the attack was of such intent and knowledge that it could be fatal and it cannot be construed as a mere assault or hammering by one person on the other.
>
> "The admission of the person to the hospital immediately after the attack at the instance of auto rickshaw driver who took him to the hospital where he was attended to immediately is enough to substantiate the aspect of the incident; the identity of the victim, the identity of the accused, the date, place and time of the incident, the manner of incident and weapon of assault. Since all these are substantiated and are beyond doubt, it would be clear from the record that the victim has

> positively proved the case of the prosecution. There can be no other option for the Court but to come to conclusion that it was in any way interconnected or on account of business rivalry or for that matter on any other extraneous ground."

54. The learned Judge's approach is peculiar. He first discusses the evidence and during the course of such discussion he makes some general remarks and some observations by referring to one or two witnesses. Then, he straightway concludes that the prosecution has proved the case beyond reasonable doubt without considering the cross-examination. When his attention is invited thereto, the learned Judge brushes the admissions aside and makes a observation that the version of the prosecution cannot be disbelieved. He goes ahead and observes that aspect of assault by the present accused cannot be denied by him. He terms the entire incident as a cool and calculated attack by taking a person to his house and assaulting a person by sword on such part of the body which could prove fatal for the injured. The entire evidence is to the contrary; or at least untrustworthy; and cannot be accepted at its face value, unless supported in material particulars, by independent evidence. The reproduction of version of witness is not its appreciation of

evidence. It contemplates reading of evidence, as a whole, including cross-examination, and other relevant circumstances, and then to come to the conclusion as to whether the version given by the witness, is probable and trustworthy.

55. The learned Judge’s attention is invited to a well known Judgment of the Hon’ble Supreme Court in case of Sarju Prasad V. the State of Bihar reported in AIR 1965 S.C. 843. With great respect, the learned Judge has neither discussed this ruling nor held in any way that it is distinguishable. He fails to apply the observations thereof.

56. The learned Judge’s observation at internal page 17 would show that the entire exercise of framing points for determination at the end of the Judgment, assigning some reasons for the conclusion, is to say least, an empty formality.

57. I would not have gone into such details but it is necessary to emphasise the well settled position in law about criminal trials and cases. The Hon’ble Supreme Court in a recent decision reported in **AIR 2002**

S.C. 2821 (Hari Kishan & State of Haryana V. Sukhbir Singh) has made the following observations on this aspect.

> "The principles to be kept in mind in our system of administration of criminal justice are stated and restated in several decisions of this Court. Yet, sometimes High Courts fail to keep them in mind before reaching a conclusion as to the guilt or otherwise of the accused in a given case. The case on hand is one such case. Hence, it is felt necessary to remind about the well settled principles again. It is desirable and useful to remind and keep in mind these principles in deciding a case."
>
> "In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the Courts entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the Court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjunctures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the Court must be integrated not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming to the conclusion as to the guilty or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the

> Court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and animus of witnesses. It must be added that ultimately and finally the decision in every case depends upon facts of each case."

58. With greatest respect to the learned Judge I find that some basic and fundamental principles have not been applied by him. There is a disturbing trend emerging in some of the decisions which have been rendered by Sessions Court in Mumbai in bail applications as well as at the trials. It is with that intent and purpose that attention is invited by me to the above principles laid down by the Supreme Court.

59. To conclude, in the light of the observations made by me with regard to the testimony of witnesses of the prosecution which is full of material discrepancies, I am of the view that the prosecution has failed to bring home the charge against the Appellant beyond reasonable doubt. The Appellant is thus entitled to be acquitted. Therefore, the appeal stands allowed. The Judgment and order of conviction and sentence rendered by the Court below is set aside. Appellant/accused is entitled to be set at liberty forthwith, if not required in any other case.

. This Court is Thankful for the assistance rendered by Mr. Makhija as Amicus Curie, so also Mrs. M.M. Deshmukh, A.P.P. A copy of this Judgment be provided to Mr. Makhija as per rules.

. In the facts and circumstances of this case and considering the efforts put in by Mr. Makhija, he shall be paid the fees, quantified at Rs. 1000/-.

(S.C.DHARMADHIKARI, J.)